

CHU CHEE PENG v. PUBLIC PROSECUTOR*

[F.C. (Ong C.J. (Malaya), Gill & Ali FJJ.)

April 25, 1973]

[Kuala Lumpur — Federal Court Criminal Reference

No. 2 of 1973]

Criminal Law and Procedure — Summary trial — Order to discharge — Not res judicata — Criminal Procedure Code (F.M.S. Cap. 6) ss. 173 and 302 — Courts of Judicature Act 1966, s. 66.

In a summary trial a magistrate is authorised by the provisions of section 173(g) of the Criminal Procedure Code (F.M.S. Cap. 6) to rule that a charge is groundless (for reasons to be recorded) at any stage after plea and in the course of hearing prosecution witnesses but before the conclusion of the prosecution case.

An order to discharge the accused under section 173(g) without hearing all the evidence which the prosecution could have adduced and where the prosecution has acquiesced to the procedure adopted is properly and lawfully made and the trial properly and lawfully conducted.

An order to discharge under section 173(g) cannot be pleaded as a bar to a second prosecution. The plea of *autrefois acquit* under section 302(i) would not be available to a person discharged who is not at the same time acquitted at the previous trial for the same offence.

Case referred to:-

(1) *Public Prosecutor v. A.G. Kyle-Little & Anor.* [1971] 1 M.L.J. 125.

FEDERAL COURT.

Amarjit Singh and Chin Hon Ngian for the applicant.

Gunn Chit Tuan (Senior Federal Counsel) for the respondent.

Ong C.J.: Under section 66 of the Courts of Judicature Act 1966 the questions referred for the decision of this court are as follows:—

“(a) Whether a magistrate in a summary trial is authorised by the provisions of section 173(g) of the Criminal Procedure Code (F.M.S. Cap. 6) to rule that a charge is groundless (for reasons to be recorded) at any stage after plea and in the course of hearing prosecution witnesses but before the conclusion of the prosecution case;

Alternatively:

What is the true construction of the words ‘at any previous stage of the case’ under section 173(g) of the Criminal Procedure Code (F.M.S. Cap. 6).

(b) If in the course of a summary trial under section 173 of the Criminal Procedure Code (F.M.S. Cap. 6) a magistrate has discharged the accused under paragraph (g) of the same section without hearing all the evidence which the prosecution could have adduced and the prosecution has acquiesced in the procedure adopted, then is the order to discharge the accused properly and lawfully made and is the trial properly and lawfully conducted.

(c) Whether a discharge under the provisions of the said section 173(g) of the Criminal Procedure Code (F.M.S. Cap. 6) amounts to an acquittal, having regard to section 302(v) of the said Criminal Procedure Code.

(d) Whether (i) the principle of *res judicata* in criminal law and/or (ii) the doctrine of issue estoppel is applicable, in the case of a person discharged under the provisions of the said section 173(g) of the Criminal Procedure Code (F.M.S. Cap. 6) when he is re-tried in a fresh trial on the same charge, in respect of basic averments of the charge on which evidence has been led and which have been adjudicated on by the court at the first trial”.

* As we go to press we learn that an appeal against this decision has been lodged to the Privy Council. *Ed. M.L.J.*

A They arose in this manner. On April 19, 1971, the applicant, a registered medical practitioner, was tried in the Sessions Court at Johor Bahru on three charges of knowingly issuing bogus medical certificates recommending sick leave to three Government employees respectively, in contravention of section 4(c) of the Prevention of Corruption Act, 1961.

B After two prosecution witnesses had been heard in respect of the first charge, defence counsel raised objection that the medical certificate tendered did not fall within the meaning of “receipt account or other document” appearing under section 4(c) of the said Act and that this charge consequently disclosed no offence in law. Prosecuting counsel raised no objection to the question of law being argued and decided at this stage. In the result, the learned President, influenced probably by a decision of the High Court in Kuala Lumpur⁽¹⁾ — that asbestos cement pipes sold and delivered not in accordance with required specifications could not be regarded as documents within the meaning of section 4(c) — upheld the objection and in respect of all three charges made an order of discharge under section 173(g) of the Criminal Procedure Code, not amounting to an acquittal.

E In August 1971 the applicant was again prosecuted *de novo* on the identical three charges and produced before a different President of the Sessions Court — the former President who had earlier tried the case having been transferred elsewhere. At the hearing of a preliminary objection on November 10, 1971 it was contended by counsel for the defence that on the doctrine of *res judicata* and issue estoppel the second trial on the same charges was invalid. This objection was dismissed and the trial directed to proceed. The defence thereupon petitioned the High Court for a review of such decision, but the decision of the learned President was upheld — resulting in this reference.

F We have closely listened to and considered the arguments put forward by learned counsel for the applicant, but, with all respect, are of opinion that all four questions can be readily answered by referring only to the express provisions of section 173(g) and sub-section (v) of section 302 of the Criminal Procedure Code, which are perfectly lucid and unequivocal, without any necessity to cite Indian or other authorities.

G Section 173 lays down the whole procedure in summary trials in the subordinate courts. The opening paragraph (a) provides that the court should see to the proper framing of the charge, which must be explained to and understood by the accused before his plea is taken. Paragraph (b) relates to conviction upon a *plea of guilty*, while all the subsequent paragraphs set out the procedure to be followed when the accused claims trial. Paragraph (f) must be known to all Magistrates, Presidents and legal practitioners by heart. If, after *all* the prosecution evidence has been heard and produced, no case has been made out in support of the charge, the acquittal of the accused is mandatory at the close of the prosecution. But, where a *prima facie* case at that stage has been established by the prosecution, para-

graphs (h) to (l) provide for all subsequent proceedings until the verdict is given.

Thus, when the whole of section 173 is viewed in logical order, it will be seen that paragraph (g) has a good *raison d'être* for its interposition between paragraph (f) and (h) *et seq.* It is to be remembered that the procedure in section 173 is for *summary* trials. There are constantly cases coming up in subordinate courts where the very corner-stone in the prosecution case collapses at an early stage for a variety of reasons. In that event, should the Magistrate continue in the profitless labour of hearing the rest of the prosecution to the bitter end, whilst realising that at the close of the prosecution he would surely have to pronounce a verdict of acquittal? Without the express powers given him by paragraph (g) the futile exercise is inevitable. Therefore the paragraph provides that:—

"(g) Nothing in paragraph (f) shall be deemed to prevent the court from discharging the accused at any previous stage of the case if for reasons to be recorded by the court it considers the charge to be groundless."

But Magistrates may occasionally be over-hasty; they may have misdirected themselves or fallen into error in other ways, when deciding to dismiss a case without wasting any more time on the prosecution. Accordingly they are required to state their reasons for so doing and, lest their error lead to irremediable consequences, they are authorised only to "discharge" the accused; not, be it noted, to "acquit" him. Thus the plea of *autrefois acquit* under section 302(i) would not be available to a person discharged who is *not at the same time acquitted* at the previous trial for the same offence. Sub-section (v) of section 302 goes on to state expressly that "the dismissal of a complaint, or the *discharge* of the accused, is not an acquittal for the purposes of this section". Hence the discharge of the applicant in the instant case by the first President cannot, in our opinion, be pleaded as a bar to the second prosecution.

It is true that under section 306 of the Criminal Procedure Code the Public Prosecutor may appeal against an order of acquittal made by any Magistrate. That provision, however, is one of general application, in no way derogating from the provisions of paragraph (g) in section 173. It is only an acquittal which requires to be set aside by the High Court before any retrial on the same charge can proceed. Hence, in paragraphs (f) and (g), the distinction between acquittal and discharge is carefully drawn by reason of the different consequences which follow a discharge not amounting to acquittal. When an order is made under paragraph (g) no appeal is necessary to have the order set aside since it is not an acquittal. It may be added that paragraph (g) by implication does not, in our opinion, authorise a Magistrate to make an order of *discharge amounting to acquittal* in any case *before the close of the prosecution*. Where the sole or main prop in the prosecution case prematurely collapses, the prosecuting officer may in his discretion offer no further evidence. In that event, if it is clearly foreseeable that the witnesses remaining to be called would be unable to establish a *prima facie* case in the teeth of evidence previously recorded, the accused may, of course, be acquitted, but such an order would in effect fall to be made equal-

ly well under paragraph (f) of section 173, or sub-sections (ii) and (iii) of section 254 of the Criminal Procedure Code.

Accordingly, the answer to question (a) is "yes"; to question (b) is again "yes"; to question (c) is "no" which necessarily makes question (d) otiose.

Questions answered.

Solicitors: Yeow & Chin.

LAI SENG & CO. v. GOVERNMENT OF MALAYSIA & ORS.

[O.C.J. (Chang Min Tat J.) April 20, 1973]

[Penang — Civil Suit No. 241 of 1971]

Government Proceedings — Action against Government — Whether public officer involved must be sufficiently identified — Whether non-joinder fatal — R.S.C. 1957, O. 16, r. 11 — Government Proceedings Ordinance, 1956, ss. 5, 6 & 18.

The plaintiff brought an action, *inter alia*, for a declaration that the defendants were not entitled to claim excess duty and for the release of detained goods. The defendants applied to set aside the proceedings for non-compliance with the provisions of the Government Proceedings Ordinance, 1956, in that the servants of the first defendant had not been sufficiently identified. In support of the application it was contended that the identity of the officer who applied or decided to apply the taxing code must be ascertained.

Held: on a proper reading of the relevant provisions of the Government Proceedings Ordinance and O.16 r.11 of the R.S.C., failure to identify the officer concerned would not incapacitate the action in this case. The application should therefore be dismissed with costs.

Cases referred to:—

- (1) *Ponnusami v. Ratnam and the Government of Malaysia* [1965] 2 M.L.J. 268.
- (2) *Haji Abdul Rahman v. Government of Malaysia & Anor.* [1966] 2 M.L.J. 174.
- (3) *Adams v. Naylor* [1946] A.C. 543, 550.

APPLICATION.

Abdul Razak bin Datuk Abu Samah (Sr. Federal Counsel) for the applicant.

P. R. Manecksha for the respondent.

Chang Min Tat J.: This was an application by the defendants to set aside the proceedings in this action with costs for non-compliance with the provision of the Government Proceedings Ordinance 1956, viz. in that the servants of the first defendant have not been sufficiently identified.

The action arose out of the difficulties encountered by the plaintiff, a firm of exporters and importers, in re-exporting goods to the principal customs area on the mainland. The difficulties concerned rather divergent views on the duties that could be imposed on the exports. In respect of the shipments of one particular item, alleged to be cotton table napkins, the plaintiff paid duty in the sum of \$1,263.50 at the rate of 25% on the value thereof, as declared. The customs applied another taxing code and demanded further duties amounting to \$11,247.35c. The plaintiff had at all